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# THE FUTURE SCOTLAND WANTS – IS IT REALLY ALL ABOUT SUSTAINABLE ECONOMIC GROWTH ?

Andrea Ross\*

## A. INTRODUCTION

On January 16, 2014, with the passing of the Regulatory Reform (Scotland) Act 2014, Scotland imposed a statutory duty on certain public bodies to ‘promote sustainable economic growth’.<sup>1</sup> The duty follows on from the Scottish Government’s overall purpose ‘To focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth’.<sup>2</sup>

That same day, a team of 10 world experts in economics, health, environmental sustainability, public policy and climate change published a paper in *Nature* which stated that the time had come to realise that gross domestic product is a misleading measure of national success – the emphasis on GDP growth in developed countries now fuels social and environmental instability and blinds developing countries to the possibilities of more sustainable models of development.<sup>3</sup> Globally, we are currently using the resources of 1.5 planets to meet our needs and using business as usual predictions, this is expected to rise to two planets by 2030.<sup>4</sup> There is an emerging consensus that we are exceeding safe planetary boundaries because we are consuming too much, and this can be attributed to our dependence on growth.<sup>5</sup> This article critically examines the Scottish Government’s decision to explicitly promote ‘sustainable economic growth’ as its overall objective. It questions whether Scotland’s new duty is evidence of this dependence and evaluates the duty’s potential in promoting and measuring national success and providing opportunities for all to flourish.

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<sup>1</sup> Regulatory Reform (Scotland) Act 2014 s.4.

<sup>2</sup> Scottish Government, *Economic Strategy*. Updated by Scottish Government, *the Government Economic Strategy* (2011) available at <http://www.scotland.gov.uk/Publications/2011/09/13091128/8>).

<sup>3</sup> R. Costanza et. al ‘Time to leave GDP behind’ (2014) 505 *Nature* 283.

<sup>4</sup> WWF, Zoological Society of London, Global Footprint Network, European Space Agency *Living Planet Report* 2012 at 38 available at

[http://awsassets.panda.org/downloads/lpr\\_2012\\_online\\_full\\_size\\_single\\_pages\\_final\\_120516.pdf](http://awsassets.panda.org/downloads/lpr_2012_online_full_size_single_pages_final_120516.pdf) ; J. Rockstrom et. al “A safe operating space for humanity” (2009) 461 *Nature* 472.

<sup>5</sup> UNEP, 2011, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication*, at 17 and 259 available at [www.unep.org/greeneconomy](http://www.unep.org/greeneconomy); T. O’Riordan (2011) “Sustainability in an age of Austerity” 23 *ELM* 160; T. Jackson *Prosperity without Growth: The transition to a sustainable economy* (SDC, 2009).

The paper also examines the possible relationship between sustainable economic growth and the widely accepted objective of sustainable development as complementary or contrasting policy objectives and legal duties. In doing so, it demonstrates the difficulties governments face in trying to put flesh on the bones of the Brundtland definition of sustainable development and accelerate progress towards sustainable living.<sup>6</sup> More specifically, the article analyses the legal, and practical implications of an overall stated Government objective of increasing sustainable economic growth and the further implications that arise now that the term is formalised in legislation. It is based on a critical review of Scottish Government policy, the provisions of the Regulatory Reform (Scotland) Act 2014 ('the Act') as well as the written and oral evidence submitted to parliamentary committees scrutinising the Bill, their reports and the subsequent Government responses. It also draws on previous research on use of legal duties to deliver government objectives and on the meaning and delivery of sustainable development.

The paper begins by examining the evolution of sustainable development as a widely accepted policy goal and the role of the economy in that journey. It then explains the Scottish Government's policy on sustainable economic growth in Scotland and the specific legal duties recently introduced in the Regulatory Reform (Scotland) Act 2014. The article moves on to critically unravel the policy goal of sustainable economic growth in the context of environmental law in Scotland and how the various interpretations of the term that have been offered by the Scottish Government and others relate to wider environmental law in Scotland. The possible interpretations and practical implications of the legal duty on its own and in relation to other functions and duties of public bodies are then explored. This analysis is used to question whether increasing sustainable economic growth is the most suitable overall goal for the Scottish Government and Scotland comparing it with other possible overall objectives such as 'flourishing' and 'sustainable development'. The article ends by suggesting an alternative role for 'sustainable economic growth' in the context of overall Scottish Government policy.

## **B. SUSTAINABLE DEVELOPMENT AND THE ROLE OF ECONOMIC GROWTH**

Humans have always understood, to some degree, that their quality of life and wellbeing depend on the quality of their environment and the availability of necessary resources. In 1980, the World Conservation Strategy: *Living Resource Conservation for Sustainable Development*, explicitly linked conservation and development in a new term, sustainable development.<sup>7</sup> In 1987, the World

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<sup>6</sup> World Commission on Environment and Development (WCCD), *Report of the World Commission on Environment and Development: Our Common Future*, U.N. Doc. A/42/427 (1987), available at <http://www.undemocracy.com/A-42-427.pdf>.

<sup>7</sup> Int'l Union for the Conservation of Nature and Natural Res., *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (1980), available at <http://data.iucn.org/dbtw-wpd/edocs/WCS-004.pdf>

Commission on Environment and Development—a panel of experts from around the world that was chaired by then-Norwegian Prime Minister Gro Harlem Brundtland set out what is now the most widely accepted interpretation of sustainable development: ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’<sup>8</sup>

The world community officially endorsed sustainable development in 1992 at the first World Summit on Sustainable Development held in Rio de Janeiro. The Rio Declaration sets out 27 principles of sustainable development that although non-binding are set out in strong legal terms. Another conference output, Agenda 21, sets out a 470 page plan of action or blueprint for sustainable development.<sup>9</sup> At the second summit held in Johannesburg in 2002, the three interdependent dimensions of sustainable development – environmental protection, economic development and social development were confirmed and focus shifted to actually delivering sustainable development.<sup>10</sup> Indeed, while sustainable development could be seen as a product, it is more usefully seen as a process that integrates development with environmental considerations and takes into account both intra and intergenerational equity.<sup>11</sup>

Sustainable development is now included in numerous multilateral and bilateral conventions and treaties as a binding objective and the UK is party to many of these treaties.<sup>12</sup> Similarly, the sustainable development is an objective of the European Union.<sup>13</sup> Many national constitutions include a reference to sustainable development and in the UK and Scotland, a legal duty to ‘contribute to the achievement of sustainable development’ (or words to that effect) regularly appears in statutes.<sup>14</sup> In most cases, if such a legal obligation exists, it is not to achieve sustainable development but to strive for it or require development decisions to take account of sustainable development, and to employ appropriate processes for doing so.<sup>15</sup>

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<sup>8</sup> World Commission on Environment and Development, *Our Common Future* (1987) (n 6).

<sup>9</sup> UNGA (1992) *The Rio Declaration on Environment and Development* 31 ILM 874; UNGA (1992) *Agenda 21*, A/CONF.151/26 Vol.1, New York: UN

<sup>10</sup> UN (2002) *Plan of Implementation of the World Summit on Sustainable Development* A/CONF.199/20/Res.2, New York: UN.

<sup>11</sup> P. Birnie, A. Boyle, C. Redgwell ‘Rights and Obligations of States concerning the Environment’ ch 3 in P. Birnie, A. Boyle and C. Redgwell (eds) *International Law and the Environment 3<sup>rd</sup> edition*, (OUP 2009) at 127; Implicit in the decision of the Gabcikovo-Nagymaros Case

<sup>12</sup> E.g. Convention on Climate Change 31 ILM 848,(1992), Article 3; Convention on Biological Diversity 31 ILM 818 (1992), Articles 8 and 10.

<sup>13</sup> Consolidated Version of the Treaty on European Union OJ (2008) C115/13, Article 3; Consolidated version of Treaty on the Functioning of the European Union, OJ (2008), C115/47, Article 11; Directive 2000/60/EC establishing a framework for Community action in the field of water policy OJ (2000), L 327, Articles 1, 3, 7, 11.

<sup>14</sup> E.g. Planning etc. (Scotland) Act 2006 s. 2. Local Government in Scotland Act 2003 s. 1 (4) Water Environment and Water Services (Scotland) Act 2003 s.2(4); Climate Change (Scotland) Act s. 44(1); Marine (Scotland) Act 2010 s.3.

<sup>15</sup> V. Barral ‘Sustainable development in international law: nature and operation of an evolutive legal norm’ (2012) 23(2) EJIL 377-400 at 391; Birnie, et al. (n 11).

Unfortunately, there is no precise meaning of sustainable development. The Brundtland definition sets wide parameters for countries, regions, organizations and individuals to operate, and allows each to set out its own detailed interpretation of sustainable development based on its particular circumstances. While this encourages discourse by bringing together different and conflicting interests, it suffers from being vague and imprecise.

French describes three main tensions within the Brundtland definition.<sup>16</sup> First, to what extent should we preserve and conserve those environmental assets that are critical to our well-being and survival as critical natural capital? Tensions exist in relation to the use of these resources, operating within the Earth's limits (ecological sustainability) and the extent to which natural capital can be replaced or offset by human or manmade capital.<sup>17</sup> There are also tensions between the environment and humans, intra-generational equity among states and within states, and intergenerational equity between the present and future generations.<sup>18</sup> Finally, tensions revolve around the role of the economy and the market, and the need for economic growth in sustainable development.<sup>19</sup>

As a result, putting flesh on the bones of the Brundtland definition has proven difficult for nations and the international community and a wide range of different interpretations can still be considered legitimate. The approaches vary in terms of the extent they prioritise certain factors over others. These factors include short term versus long term benefits, the need for economic growth, the need to redistribute assets and resources to address poverty and other inequities, the need to reduce consumption and resource use, the need to address population and the need to adapt to and mitigate climate change.<sup>20</sup>

The so-called 'weaker' versions of sustainable development still advocate high economic growth and are based on the premise that technology and international trade will ensure there are always enough resources to meet cultural or human carrying capacity. Indeed, most of the solutions promoted, sought and developed under this technological approach have focused on improving the environmental credentials of the products supplied, with little attention being paid to the demand side of the equation.

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<sup>16</sup> D. French *International Law and Policy for Sustainable Development* (Manchester Univ. Press, 2005) at 10-34.

<sup>17</sup> D. Pearce *Blueprint 3: Measuring Sustainable Development* (Earthscan, 1993), at 15-16; J. Bowers *Sustainability and Environmental Economics: An Alternative Text* (Longman, 1997), at 194.

<sup>18</sup> French (n.16) at 30-33.

<sup>19</sup> French, (n16) at 26.

<sup>20</sup> A. Ross, 'Sustainable development in Scotland post devolution', (2006) 8 *Environmental Law Review*, 6-32.

The result is that while fewer resources are required per unit of energy, transport, food and so on, more units (such as cars) are being consumed.<sup>21</sup>

As set out above negative environmental trends continue and much of the world's population lives in poverty. Moreover, many economies have been trying to recover from the collapse of the financial markets and are facing times of austerity. The weak or 'wish list' approach to sustainable development has not delivered the right balance. Many of these interpretations use a three pronged approach to balance economic, social and environmental factors which are then portrayed as win-win scenarios. These weak approaches can justify just about anything so long as it promotes one of the three pillars and as such, can lead to 'business as usual'. By failing to prioritize ecological sustainability, weak approaches to sustainable development allow 'short-termism' to prevail, with little or no consideration given to the Earth's limits, the needs of future generations or indeed, the needs of the poorer members of the present generation.<sup>22</sup>

The final outcome documents from Rio +20 in June 2012 and from conference of the parties to the Climate Change Convention held in Doha, Qatar later that year emphasise the critical need to "accelerate" progress towards sustainability and reducing the emission of greenhouse gases respectively.<sup>23</sup> At the same time, many countries are still burdened with high unemployment and huge national debt. General UK government gross debt (nominal value) was £1,461 billion or 90.6% of GDP for the calendar year 2013.<sup>24</sup> To this end, attention more recently has been focussed on the role of the economy in delivering the economic recovery, and addressing climate change while still progressing towards long-term sustainable development. One solution put forward has been to 'green' the economy.

In its paper *Towards a green economy* the United Nations Environment Programme states 'that many green sectors provide significant opportunities for investment, growth and jobs. For this to occur, however, new enabling conditions are required ... which in turn call[s] for urgent action by policy

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<sup>21</sup> E.g. automobiles. See Department for Transport, *Transport Statistics for Great Britain 2013* available at <https://www.gov.uk/government/publications/transport-statistics-great-britain-2013>

<sup>22</sup> D. Helm, 'Objectives, instruments and institutions', in D. Helm (ed) *Environmental Policy Objectives, Instruments and Implementation*, (Oxford University Press, 2000), at 12; A. Ross *Sustainable Development Law in the UK - From Rhetoric to Reality* (Earthscan/Routledge, 2012) chapters 4 and 14.

<sup>23</sup> United Nations General Assembly, Resolution adopted by the General Assembly on 27 July 2012, Annex 1 *The Future We Want* A/RES/66/288 p10; UN Climate Change Conference in Doha, Qatar 2012 (COP18/ CMP8), *The Doha Climate Gateway* available at [http://unfccc.int/key\\_steps/doha\\_climate\\_gateway/items/7389.php#Specific\\_Outcomes](http://unfccc.int/key_steps/doha_climate_gateway/items/7389.php#Specific_Outcomes)

<sup>24</sup> Office for National Statistics Statistical bulletin: EU Government Deficit and Debt Return, March 2014 available at <http://www.ons.gov.uk/ons/rel/psa/eu-government-debt-and-deficit-returns/march-2014/stb---march-2014.html>

makers'.<sup>25</sup> UNEP defines a green economy as one that results in 'improved human wellbeing and social equity while significantly reducing environmental risks and ecological scarcities. At its simplest expression, a green economy is low carbon, resource efficient and socially inclusive.'<sup>26</sup> Interestingly, UNEP describes a green economy, not as a result or objective in and of itself but rather as an enabler which will generate sustainable results for the broader aim of sustainable development.

One of the two themes at Rio +20 in 2012 was the transition to a green economy and the outcome document *the Future We Want*, sets some parameters for a green economy. 'We emphasize that it [a green economy] should contribute to eradicating poverty as well as sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all, while maintaining the healthy functioning of the Earth's ecosystems.'<sup>27</sup> Once again, green economy is described as a tool or enabler for achieving sustainable development rather than as an end in itself.

Advocates of 'green economy' agree (at least in theory) that we need to change the way we judge prosperity from 'having more to being more'<sup>28</sup> and transform the various sectors (transport, agriculture, energy) to become low carbon, ecosystem friendly and resource efficient. Most agree that state investment is crucial to this change and advocate changes to the indicators of economic performance to account for loss in natural capital.<sup>29</sup> What is in dispute is the role of economic growth in this transformation and whether continued economic growth is necessary for a transition to a green economy and, in turn, for sustainable development. 'Economic growth' is an increase in the amount of goods and services produced per head of the population over a period of time. It is measured by gross domestic product (GDP).<sup>30</sup> Historically, economic growth was supposed to deliver prosperity. However, a growing economy relies on increased consumption and production both in terms of population and in terms of goods and services and so far this has resulted in over-use of our natural resources. It also means more and more waste and pollutants are generated thus threatening our ability to operate safely within the Earth's planetary boundaries.<sup>31</sup>

UNEP state that 'the key aim for transition to a green economy is to enable economic growth and investment while increasing environmental quality and social inclusiveness.'<sup>32</sup> UNEP see creating conditions for public and private investments to incorporate broader environmental and social criteria

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<sup>25</sup> UNEP (n 5) at 16.

<sup>26</sup> UNEP (n 5) at 16.

<sup>27</sup> United Nations General Assembly, *The Future We Want* (n 23) at 10.

<sup>28</sup> see Earth Charter Initiative *The Earth Charter* <http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html> .

<sup>29</sup> UNEP (n 5) at 16 Costanza et al (n 3); O'Riordan (n 5).

<sup>30</sup> <http://www.oxforddictionaries.com/definition/english/economic-growth>

<sup>31</sup> Rockstrom (n 4) at 472.

<sup>32</sup> UNEP (n 5) at 16.

as critical to attaining such an objective. In its view, a green economy, growth in income and employment are driven by public and private investments that reduce carbon emissions and pollution, enhance energy and resource efficiency, and prevent loss of biodiversity and ecosystem services.<sup>33</sup>

In contrast, Jackson acknowledges that poorer nations stand in urgent need of economic development but questions whether ever rising incomes for already rich are an appropriate goal for policy in a world constrained by environmental limits.<sup>34</sup> He argues that there is an urgent need to develop a resilient and sustainable macro-economy that is no longer predicated on relentless consumption growth and that as long as macro-economic stability depends on economic growth government will have an incentive to support social structures that undermine commitment to any transformative initiatives and instead reinforce materialistic novelty seeking individualism.<sup>35</sup>

In practice, it is likely that the role of economic growth in the transformation to a green economy and sustainable development of individual states will vary depending on the specific demographics of that state and ‘the future it wants’. For example, is its population growing, aging or shrinking and does it want to address this? Is there a decent standard of living and is it equitably distributed amongst its population? Does it host significant biodiversity and are important ecosystems under threat? These factors and others may dictate whether that particular economy grows, shrinks or stays the same. As long as it is moving the state to a more sustainable existence in the long term more does it matter?<sup>36</sup>

The remainder of this paper provides a critique of the Scottish Government’s decision to explicitly promote ‘growth’ through its policy and now legal duty to promote ‘sustainable economic growth’ instead of specifically acknowledging the variables set out above. It considers whether references to a stable economy or sustainable economy might better reflect these uncertainties while still addressing the need to transform economies into ‘green economies’. The paper also questions why the Government has not chosen to use sustainable economic growth as enabler which would be consistent with the approaches taken on by both UNEP and in the Rio + 20 instead preferring to refer to it as the Government’s overall objective. Indeed, a theme running through this article is the difference between viewing a goal or principle as an enabler or an outcome as well as the role of both for accelerating change.

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<sup>33</sup> UNEP (n 5) at 16.

<sup>34</sup> Jackson (n 5) at 6.

<sup>35</sup> Jackson (n 5) at 12

<sup>36</sup> See difference between resilience and sustainability below.



## C. POLICY CONTEXT OF SUSTAINABLE ECONOMIC GROWTH IN SCOTLAND

The UK was one of the first countries to respond to the Brundtland Report. In hindsight, its response was prophetic ‘there can be no quarrel with the [Brundtland principles] as a general definition. The key point is how to translate it into practice, how to measure it, and how to assess progress towards it achievement’.<sup>37</sup> Governments are still grappling with how to tackle these challenges to accelerated progress and this paper specifically explores that struggle in the context of recent events in Scotland.

In the UK and Scotland, over time the strategic objective of sustainable development has proven to be something of a moving goal post. It began in the 1994 UK strategy as a trade-off between the environment and economic development, and was expanded in 1999 UK strategy to include social concerns while still pursuing high economic growth as an objective.<sup>38</sup> Arguably, for the UK government, the high point in terms of a strong more ecologically focused approach to sustainable development came in 2005 when it, together with the administrations in Scotland, Wales and Northern Ireland, jointly produced the ambitious *One Future – different paths* - the UK’s Shared Framework for Sustainable Development which set out five principles:

- living within the Earth’s environmental limits;
- ensuring a strong, healthy and just society;
- achieving a sustainable economy;
- promoting good governance; and
- using sound science responsibility.<sup>39</sup>

The first two principles are often held out as the overall desired outcomes and the last three are considered the enablers or means of achieving these objectives. The Scottish Government supported this interpretation of the Framework in its 2010 Scottish Planning Policy.<sup>40</sup> More recent Scottish policy is less precise and simply states the Government’s support for the five principles in the Shared Framework.<sup>41</sup> Indeed, as of the spring of 2014 all four of the UK administrations remain on paper at least, committed to the five principles.

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<sup>37</sup> UK Government *A perspective by the United Kingdom on the Report of the World Commission on Environment and Development* (1988)

<sup>38</sup> UK Government, *Sustainable Development: the UK Strategy* (1994), para 7; Department of Environment, Food and Rural Affairs *A Better Quality of Life* paras 1.1-1.2

<sup>39</sup> HM Government, Scottish Executive, Welsh Assembly Government, Northern Ireland Office, *One future different paths: the UK’s shared framework for sustainable development* (2005) at 8.

<sup>40</sup> Scottish Government, *Scottish Planning Policy* (2010) para 35 available at <http://www.scotland.gov.uk/Publications/2010/02/03132605/0>.

<sup>41</sup> Scottish Government, *Draft SPP Sustainability and Planning* (October 13, 2013) para 4 available at <http://www.scotland.gov.uk/Resource/0043/00437081.pdf>

Prior to devolution, reference to sustainable development in Scottish policy was largely limited to planning guidance and some development plans.<sup>42</sup> Following the introduction of devolution in 1999, and unlike the Welsh Assembly, the Scottish Executive was under no obligation and in no hurry to produce an explicit strategy for sustainable development in Scotland.<sup>43</sup> During that time the Scottish Executive did produce evidence of strategic thinking on sustainable development through general statements such as the Liberal – Labour Partnership Agreement<sup>44</sup> and the Scottish Executive’s statement on sustainable development - *Meeting the Needs*.<sup>45</sup> The result was that while many impressive initiatives were taken during that time – increasing the powers of the Sustainable Development Commission in Scotland, introducing some basic indicators for sustainable development and certain legal duties<sup>46</sup> as well as legislating beyond the scope of the Strategic Environmental Assessment directive to include strategies as well as certain plans and programmes,<sup>47</sup> the effect was inconsistent, piecemeal, misunderstood and often counterproductive.<sup>48</sup> For example, Scotland’s sustainable development indicators were criticized for not being aligned with policy objectives, unrepresentative and insufficiently demanding.<sup>49</sup>

When *Choosing Our Future – Scotland’s Sustainable Development Strategy* finally did appear in December 2005, it closely followed the UK Shared Framework for Sustainable Development as a template using the same five principles.<sup>50</sup> *Choosing Our Future* quickly became a historic document. After the Scottish National Party’s success in the Scottish Parliament’s election in May 2007, it replaced the previous government’s sustainable development strategy with its own *Economic Strategy* (the ‘Strategy’)<sup>51</sup> in which the Scottish Government adopted a single purpose: ‘To focus government and public services on creating a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth’. When the strategy was updated in 2011, the overall purpose and approach remained unchanged.<sup>52</sup> The Government’s intention is to mainstream

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<sup>42</sup> Scottish Office, *National Planning Policy Guideline: The Planning System NPPG 1* (1994); Scottish Natural Heritage *Sustainable Development and the Natural Heritage: the SNH Approach* (1993).

<sup>43</sup> Ross (n 20) at 8.

<sup>44</sup> Scottish Labour Party, Scottish Liberal Democrats, *A Partnership for a Better Scotland: Partnership Agreement* (2003). Throughout there was a ‘green thread’ highlighted by a tree symbol.

<sup>45</sup> Scottish Executive, *Meeting the needs...Priorities, Actions and Targets for Sustainable Development in Scotland* (2002).

<sup>46</sup> For example, the Water Environment and Water Services (Scotland) Act 2003 s.2(4)(ii); Land Reform (Scotland) Act 2003s.38(1)(b)(ii).

<sup>47</sup> Environmental Assessment (Scotland) 2005 s.4(4).

<sup>48</sup> Ross, (n 20) at 29.

<sup>49</sup> S.L. Russell and I Thompson “Accounting for a sustainable Scotland” (2008) 28(6) Public Money and Mgt 367-74; SDCS *Sustainable Development a Review of Progress by the Scottish Government* (2008); House of Commons, Environmental Audit Committee (EAC) *Eleventh Report on – Sustainable Development Headline Indicators 2002*, HC 1080.

<sup>50</sup> Scottish Executive, *Choosing our Future – Scotland’s Sustainable Development Strategy* (2005).

<sup>51</sup> Scottish Government, *Economic Strategy* (n 2). at para A.1 (2007 strategy) at 12 (2011 updated strategy). Interestingly, this strategy was not subjected to an SEA.

<sup>52</sup> Scottish Government, *Economic Strategy* (n 2).

sustainable development across Government through its commitment to *sustainable economic growth*. Since 2007 the Scottish Government has incorporated its overall approach in other key strategic documents including those relating to land and marine planning, the NHS and the historic buildings.<sup>53</sup>

However, the Strategy is much, much more than just its purpose. Viewed in its entirety and with the National Performance Framework ('NPF') (see below) it sets out a systematic and, some would say, managerialist approach to governance. The vision for success for Scotland is described and measured in six parts that support and reinforce each other:

- Government's purpose (sustainable economic growth)
- six associated purpose targets;
- six strategic priorities;
- six strategic objectives that are the focus of actions;
- 15 national outcomes describing what the Government wants to achieve; and
- 50 national indicators to track progress.

In many respects this holistic approach is clear, focused, and SMART (specific, measurable, achievable, relevant and time bound). To analyse the approach it is useful to divide the six components into two categories – those which describe the aspirations or outcomes for Scotland and those which describe how to get there or enablers and actions. The purpose, purpose targets and strategic priorities are actually all part of the action side while the objectives and national outcomes reflect the aspirations the Government has for Scotland. The national indicators measure progress towards both the actions and aspirations.

The overall vision is articulated in the Purpose Framework that is part of the NPF. It identifies three key components of faster sustainable economic growth: productivity, participation, population, and three desired characteristics of growth - solidarity, cohesion and sustainability which together with sustainable economic growth form seven purpose targets.<sup>54</sup> There are descriptors for each target to set the direction and ambition. For example, the sustainable economic growth target is to match the growth rate of the small independent EU countries by 2017. The population target is to match average European (EU15) population growth over the period from 2007 to 2017, supported by increased healthy life expectancy over this period. The solidarity target is increase overall income and the proportion of

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<sup>53</sup> Historic Scotland, *Scottish Historic Environment Policy* (2011) <http://www.historic-scotland.gov.uk/shep-dec2011.pdf>; Scottish Government *Scottish Planning Policy* (2010) (n 40); Scottish Government, *Planning Scotland's Seas – Scotland's National Marine Plan Consultation Draft* (2013) available at <http://www.scotland.gov.uk/Publications/2013/07/9185/downloads> Scottish Government *The Healthcare Quality Strategy for NHS Scotland* (2010) available at <http://www.scotland.gov.uk/Resource/Doc/311667/0098354.pdf>

<sup>54</sup> Scottish Government, *National Performance Framework (NPF)* (2011) available at <http://www.scotland.gov.uk/About/Performance/purposesstratobjts> (the original was published in 2008)

income earned by the three lowest income deciles as a group by 2017 and the sustainability target is to reduce greenhouse gas emissions by 80 per cent by 2050.

While the targets show clear links to equity and fairness, they support an interpretation of sustainable economic growth that does not have the Earth's limits at its core. The Government is advocating increasing rather than decreasing consumption in its sustainable economic growth, productivity and population targets. Moreover, the sustainability target is very narrowly focused and relates only to reducing greenhouse gas emissions.<sup>55</sup> The targets not only suggest a bias in the strategy in favour of economic growth but also that the Government equates sustainability with addressing climate change.

The Strategy identifies six strategic priorities it considers to be critical to economic growth: learning, skills and well-being; supportive business environment; transition to a low carbon economy; infrastructure development and place; effective government; and equity. Each of these are described in the Strategy in terms of the purpose targets –how dealing with each strategic priority will actively promote productivity, participation, population, solidarity, cohesion and sustainability. While equity is a priority in its own right, it is hard to find ecological sustainability in these priorities beyond reducing green house gas emissions.

The NPF also sets out strategic objectives for Scotland: wealthier and fairer, smarter, healthier, safer, and stronger and greener. These are further developed by 15 national outcomes. These objectives and national outcomes are aspirations that set out the Government's hopes for Scotland's future. These include 'we have tackled significant inequalities in Scottish society; we value and enjoy our built and natural environment and protect it and enhance it for future generations and we reduce the local and global environmental impact of our consumption and production.'<sup>56</sup> In defining the future Scotland the Government wants in terms of outcomes, both equity and living within the Earth's limits are well represented.

Thus, equity is represented as both an action/enabler and an aspiration in the Strategy and NPF, however, living within the Earth's limits or environmental sustainability is only set out in the Government's aspirations for Scotland. It is not obvious among the purpose, purpose targets or strategic priorities. In many ways it is an aspiration without action, or in other words – rhetoric.

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<sup>55</sup> Scottish Government, *NPF* (n 54).

<sup>56</sup> Scottish Government, *NPF* (n 54).

This observation is confirmed by the progress made towards the National Performance Indicators. The Strategy sets out fifty national indicators to measure its progress and these relate to both outcomes and actions.<sup>57</sup> These are reported and updated regularly online. As of October 11, 2014, the picture since 2007 is mixed. Of the 50 indicators, 18 have improved, 25 stayed the same and 7 have worsened.<sup>58</sup> This is similar to elsewhere in the UK where consistently in the past 10 years over half of the indicators have either worsened or stayed the same.<sup>59</sup>

The picture is even less positive when looking only at the seven environmental indicators.<sup>60</sup> Of these seven, three have improved (increase the abundance of terrestrial breeding birds: biodiversity; reduce waste generated and increase renewable electricity production), two have stayed the same (improve the condition of protected nature sites; increase the proportion of journeys to work made by public or active transport) and two have worsened (improve the state of Scotland's marine environment; reduce Scotland's carbon footprint).<sup>61</sup>

In summary, there is a dichotomy in the Strategy and the NPF and this affects the clarity of the vision. While clearly a part of the Government's aspirations, living within ecological limits is not a key Scottish Government priority nor is it covered on the action side of the NPF. Predictably, the environmental indicators are performing worse than the set overall. Before exploring the Government's overall purpose and the meaning of sustainable economic growth in detail, it is necessary to explain how the term has recently become part of the law in Scotland.

#### **D. SUSTAINABLE ECONOMIC GROWTH AND THE REGULATORY REFORM (SCOTLAND) ACT 2014**

In March 2013 the Scottish Government introduced the Regulatory Reform (Scotland) Bill in the Scottish Parliament. The Bill was aimed at improving the way regulation is developed and applied, creating more favourable business conditions in Scotland and delivering benefits for the environment. It aimed to contribute to the Scottish Government's purpose of focussing Government and public

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<sup>57</sup> Scottish Government, *NPF* (n 54).

<sup>58</sup> Scottish Government, National Indicators webpage available at <http://www.scotland.gov.uk/About/Performance/scotPerforms/indicator> (accessed 11 October 2014)

<sup>59</sup> DEFRA *National Statistics Compendium, Measuring Progress: Sustainable Development Indicators*, (DEFRA 2010); Statistics for Wales, *Sustainable Development Indicators for Wales* (WG, 2012) available at <http://wales.gov.uk/docs/statistics/2012/120829susdev12en.pdf> accessed 12 June 2013.

<sup>60</sup> The quality, representativeness and relevance of individual indicators have been questioned. The Sustainable Development Commission reported in 2009 that who reported that it did not feel that all indicators selected were the most appropriate in illustrating the core sustainable development challenge' Sustainable Development Commission (Scotland) *Sustainable Development: Third Annual Report of Progress by the Scottish Government*, (2009) Annex 2.2.

<sup>61</sup> Scottish Government, National Indicators webpage (n 58).

services on creating a more successful country, with opportunities for all Scotland to flourish, through increasing sustainable economic growth.

The original consultation paper on Proposals for a Better Regulation Bill suggested a duty in relation to better regulation: ‘a new generic statutory duty on Scottish regulatory authorities to consider (and report on) the impact of their regulatory activity on business and/or promote regulatory principles which could further encourage and support economic growth without undermining their core objectives.’<sup>62</sup> This subsequently became the duty for sustainable economic growth in the Bill (Act).

As passed, the Act introduces a duty on certain public bodies that requires regulatory functions to be exercised in a way that contributes to achieving sustainable economic growth. The list of public bodies includes: the Accountant in Bankruptcy, the Food Standards Agency, Healthcare Improvement Scotland, Local authorities, the Scottish Charity Regulator, Scottish Environment Protection Agency, Scottish Fire and Rescue Service, Scottish Housing Regulator, Scottish Natural Heritage, Social Care and Social Work Improvement Scotland and VisitScotland.<sup>63</sup>

Specifically, the Regulators’ duty in respect of sustainable economic growth in section 4 provides that:

- (1) In exercising its regulatory functions, each regulator must contribute to achieving sustainable economic growth, except to the extent that it would be inconsistent with the exercise of those functions to do so.
- (2) The Scottish Ministers may give guidance to regulators with respect to the carrying out of the duty imposed by subsection (1).
- (3) Regulators must have regard to guidance given under subsection (2).
- (4) The Scottish Ministers must publish (in such manner as they consider appropriate) any such guidance.
- (5) Subsection (1) does not apply to a regulator to the extent that the regulator is, by or under an enactment, already subject to a duty to the same effect as that mentioned in that subsection.

Sections 5 and 6 then provide that the Scottish Ministers may issue and from time to time revise a code of practice in relation to the exercise of regulatory functions by a regulator and the procedures for doing so.

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<sup>62</sup> Scottish Government, Consultation on Proposals for a Better Regulation Bill (August 2012) available at <http://www.scotland.gov.uk/Publications/2012/08/8403/downloads#res398287>

<sup>63</sup> 2014 Act, Schedule 1.

The Act also directly addresses the functions, purpose and powers of the Scottish Environment Protection Agency (SEPA). In particular, section 51 introduces a new general purpose for SEPA under s 20A (of the amended Environment Act 1995) which provides that

- (1) SEPA is to carry out the functions conferred on it by or under this Act or any other enactment for the purpose of protecting and improving the environment (including managing natural resources in a sustainable way).
- (2) In carrying out its functions for that purpose SEPA must, except to the extent that it would be inconsistent with subsection (1) to do so, contribute to—
  - (a) improving the health and well being of people in Scotland, and
  - (b) achieving sustainable economic growth.

Three parliamentary committees examined the Bill - the Delegated Powers and Law Reform Committee (DPLRC), the Economy, Energy and Tourism committee (EETC) and the Rural Affairs, Climate Change and Environment Committee (RACCEC). A number of stakeholders expressed concerns about the Bill in written and oral evidence during the inquiries (see section D below).

The DPLRC report raised concerns about the limited scrutiny offered for the proposed guidance and the code of practice given their importance to the sustainable economic growth duty and suggested both be published on issue.<sup>64</sup> The RACCEC report welcomed the policy intention behind the Bill and in particular recognised the value of the new general purpose for SEPA that highlights the three elements of sustainable development and gives primacy to the environmental element. However, it was concerned that there is no statutory definition of sustainable economic growth and it is unclear how the duty and the code of practice in respect of that duty would impact on the day to day activities of regulators within its remit. The Committee was also unclear as to why the term sustainable economic growth has been used in the Bill rather than sustainable development on the grounds that while neither has a statutory definition sustainable development has international recognition and is understood legally across a number of regimes and jurisdictions. It had also been used in previous Scottish legislation.<sup>65</sup> The lead EETC's report referred to many of the conclusions in the RACCEC report. In particular, it noted that the Parliament and the Scottish Government have a duty to minimise the risk of future conflicts by ensuring that the Scottish Government's definition of sustainable economic growth is explicitly stated and explained in subsequent guidance. Drafts of this guidance ought to be submitted to the Parliament for scrutiny prior to being issued by Scottish Ministers'.<sup>66</sup>

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<sup>64</sup> Scottish Parliament, Delegated Powers and Law Reform Committee 40th Report, 2013 (Session 4) Regulatory Reform (Scotland) Bill SP Paper 373 (Web Only), DPLR/S4/13/R40.

<sup>65</sup> Scottish Parliament, Rural Affairs, Climate Change and Environment Committee 6th Report, 2013 (Session 4) Report on the Regulatory Reform (Scotland) Bill SP Paper 376 (Web Only), RACCE/S4/13/R6;

<sup>66</sup> Scottish Parliament, Economy, Energy and Tourism Committee 11th Report, 2013 (Session 4) Stage 1 Report on the Regulatory Reform (Scotland) Bill SP Paper 399 (Web Only), EET/S4/13/R11.at recommendation 7

The Government published its stage two amendments in December 2013, this was followed by a debate in plenary on November 12, 2013.<sup>67</sup> The Bill was passed on January 16, 2014 as the Regulatory Reform (Scotland) Act 2014 ('the Act'). The Act's substantive provisions on the duty are not significantly different from those in the Bill rather the key amendments relate to the content and process of approving the supplemental regulations and code of practice. The draft code of practice includes a definition of sustainable economic growth (see below). The significance and contribution of the overall objective of sustainable economic growth and, more specifically, these new duties is discussed below but such analysis needs to be set in the context of Scotland's wider international, EU, national and devolved commitments. Scotland as part of the UK, is committed to certain international obligations and principles and under the Scotland Act 1998,

As set out above, Scotland is explicitly bound to comply with EU law which has the integration of environmental protection into all decision making as a key principle and sustainable development as one of its objectives.<sup>68</sup> Scotland has set itself demanding targets for reducing its greenhouse gas emissions and increasing its use of renewables and increasing biodiversity. The extent that the term 'sustainable economic growth' sits comfortably with these other commitments will depend on how it is interpreted and used by the Government in particular but others as well.

## **E. SUSTAINABLE ECONOMIC GROWTH AND ENVIRONMENTAL LAW IN SCOTLAND**

Sustainable economic growth developed as a policy goal for Scotland from 2007 to 2013 with only a limited amount of grumbling. Policy is not binding and the Sustainable Development Commission in Scotland (SDCS) concluded in 2009, that "taken as a whole, the Purpose, with its emphasis on *'opportunities for all of Scotland to flourish'* requires Government to address wider sustainable development issues".<sup>69</sup> The decision to make sustainable economic growth a duty on public bodies in 2013 however, did attract more attention from a number of actors and sectors. Those respondents in favour of the duty including the Government itself, focused their evidence on the Bill's better regulation objective. The Federation for Small Businesses in Scotland stated that "A duty to contribute to sustainable economic growth could provide stronger focus on improving how regulators interact with businesses, with the aim of facilitating compliant growth."<sup>70</sup> Indeed, many of the advocates of the duty for 'sustainable economic growth' on public bodies were actually seeking legislation on better

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<sup>67</sup> Scottish Parliament, Official Report Session 4 Tuesday November 12, 2013, cols 24273 – 24308 available at <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8619&mode=pdf>

<sup>68</sup> TFEU and specific directives including

<sup>69</sup> Sustainable Development Commission Scotland (SDCS) (n 30) 6.

<sup>70</sup> Federation of Small Businesses written evidence to EETC, Scottish Parliament EETC Report (n 66) Annex D at 3. See also written evidence of Scottish Council for Development and Industry (n 66).



regulation as the name of the Act suggests. In evidence, they repeated they did not want the economy to be prioritised over social and environmental concerns and regularly misquoted the duty as ‘sustainable economic development’.<sup>71</sup> They were seeking predictable, efficient regulation to allow businesses to flourish. Making businesses fill out the same form three times is not sustainable in an economic, social or environmental sense and the Act, as passed, includes other provisions that promote ‘better regulation’ much more directly than the duty on public bodies to ‘contribute to sustainable economic growth’. The Scottish Ministers have powers under section 1 to make regulations to encourage and improve consistency in the exercise of regulators functions and under section 5 to issue a code of practice in relation to the exercise of regulatory functions.

Other respondents including the Convention of Scottish Local Authorities, the Law Society of Scotland, the Royal Society for the Protection of Birds, Scottish Trades Union Congress and UNISON were concerned about the uncertainty the duty could add to the regulatory process and its potential to prioritise economic growth over other environmental and social objectives.<sup>72</sup> Many respondents to the consultations and stage 1 inquiries emphasised the inconsistency created by the new duty. Two sources of inconsistency are worthy of further analysis. First, there are concerns about the meaning of the term ‘sustainable economic growth’ itself and second, there are concerns about the ambiguity caused by the wording of the duties and their relationship with other obligations on public bodies.

#### (1) Inconsistencies within the term ‘sustainable economic growth’

The meaning of the full phrase ‘sustainable economic growth’ is ambiguous. Professor Reid in evidence asked ‘is it economically sustainable growth, or economic growth within the limits of (ecological and social) sustainability?’<sup>73</sup> The Economic Strategy and the Act are both silent on the definition. The Government appears very unsure of its own definition and, as detailed below, has recently described the term in no less than five different ways.

The 2010 Scottish Planning Policy defined sustainable economic growth as ‘building a dynamic and growing economy that will provide prosperity and opportunities for all, while respecting the limits of our environment in order to ensure that future generations can enjoy a better quality of life too’.<sup>74</sup> In July 2013 this definition reappeared in Planning Scotland’s Seas – Scotland’s National Marine Plan

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<sup>71</sup> Scottish Parliament, Economy, Energy and Tourism Committee, Official Report, Wednesday 29 May, 2013 col. 2892-2934, at 2903, 2905 and 2927.

<sup>72</sup> Scottish Parliament, EETC Report (n 66) Annex D.

<sup>73</sup> Professor Colin T. Reid, written evidence to EETC, available at [http://www.scottish.parliament.uk/S4\\_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Prof.\\_Colin\\_T.\\_Reid%281%29.pdf](http://www.scottish.parliament.uk/S4_RuralAffairsClimateChangeandEnvironmentCommittee/General%20Documents/Prof._Colin_T._Reid%281%29.pdf)

<sup>74</sup> Scottish Government, *Scottish Planning Policy* (2010) (n. 40) at para 36

Consultation Draft.<sup>75</sup> This interpretation makes respecting the limits of the environment an explicit condition of sustainable economic growth and is consistent ecologically focused interpretation of sustainable development.

However, the draft replacement Scottish Planning Policy published in April 2013 and sent out for consultation did not replicate the same clear definition but instead offered two long paragraphs on the topic. One simply restated the Government's purpose and the other provided that 'Planning has a positive and proactive role to play in building a dynamic and growing economy that offers opportunities for all, while making efficient and responsible use of land, environmental and other physical resources and infrastructure. The aim is to achieve the right development in the right place, rather than development at any cost.'<sup>76</sup> Neither paragraph provided any guidance as to the meaning of sustainable economic growth.

In light of responses to the consultation, the Government produced a new draft policy on 'Sustainability and Planning' that was sent out for consultation in October 2013. It provides another definition of 'sustainable economic growth': 'building a dynamic and growing economy that will provide prosperity and opportunities for all while ensuring that future generations can enjoy a better quality of life too.'<sup>77</sup> While similar to the definition in the draft Marine Plan, this definition omits any reference to 'respecting the limits of our environment' and is thus, more consistent with an interpretation of sustainable economic growth which prioritises growing the economy.

This definition subsequently reappears in January 2014 in the Consultation on Scottish Regulators' Strategic Code of Practice for the Act.<sup>78</sup> However, two important statements have been added: 'The health of Scotland's communities and environment contribute to and are interlinked with the achievement of sustainable economic growth' and 'Economic growth that exceeds the limits of our environment or damages social and community cohesion is not sustainable.'<sup>79</sup> Taken together, the three sentences bring the Code's definition closer to that in the Marine Plan than the amended SPP provisions on Sustainability and Planning. These are also closer to sustainable development albeit weak sustainable development as they still maintain a growth imperative. The definition reappears again in

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<sup>75</sup> Scottish Government, *Scotland's National Marine Plan Consultation Draft* (n 53) at 13.

<sup>76</sup> Scottish Government, *Draft Scottish Planning Policy* (April 30, 2013) paras. 15-16 available at <http://www.scotland.gov.uk/Publications/2013/04/1027/0>

<sup>77</sup> Scottish Government, *Sustainability and Planning* (n 41) at para 4.

<sup>78</sup> Scottish Government, Consultation on Scottish Regulators' Strategic Code of Practice Annex A January 29, 2014 available at <http://www.scotland.gov.uk/Publications/2014/02/5027/downloads#res442858>

<sup>79</sup> Scottish Government, Consultation on Scottish Regulators' Strategic Code of Practice (n 78) Annex A.

May 2014, in the consultation on the draft statutory guidance for SEPA but this time regrettably without the two additional statements.<sup>80</sup>

Meanwhile, in speeches, other documents and other parts of the strategy, the Government regularly states that it is focusing on ‘increasing sustainable economic growth’ with statements such as ‘faster sustainable economic growth is the key to unlocking Scotland’s potential’.<sup>81</sup> These statements are arguably the most pro economy as their emphasis is on the need to accelerate growth. It is also often the case that reducing the consumption of resources other than carbon is often omitted from discussions about the overall vision for Scotland.

The different versions of sustainable economic growth presented by different parts of the Scottish Government over such a short period of time highlight the Government’s struggles about how to get Scotland closer to the aspirational outcomes it has set. While still being clearly attached to the growth imperative, the Government is engaging in a very open discussion about what type of growth is necessary for Scotland to flourish. The debates in many ways mirror those described in Section B about the transition to a green economy, the role of growth, how to operate within planetary boundaries. Importantly, however, in Scotland that debate is extending beyond government to the wider policy community who have divergent views about whether growth is needed, the type of growth needed and how much.

Even if this general interpretation issue is resolved, there is uncertainty over the term’s meaning in specific instances. What does it mean for SEPA, for the NHS in Scotland or Scottish Enterprise? In its report, the RACCE Committee raised a concern that if the duty is not properly defined and understood it will be difficult to enforce.<sup>82</sup> As agreed, the Scottish Government has produced a draft strategic code of practice for Scottish regulators in respect of their duties that is subject to consultation and Parliamentary scrutiny.<sup>83</sup> The consultation on the draft code provides that the statutory duty is intended to empower regulators, requiring them to take economic factors appropriately and proportionately into account in their decision-making process, and to be accountable for those policies and decisions. The consultation then states that the code’s aim is to describe in more detail how regulators should apply regulatory principles and build good practice in order to contribute to achieving sustainable economic growth while concurrently delivering their other core functions. The duty does not prioritise sustainable economic growth over other regulatory objectives; it requires regulators to

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<sup>80</sup> Scottish Government, Consultation on the Statutory Guidance on the General Purpose for the Scottish Environment Protection Agency and its contribution towards Sustainable Development available at <http://www.scotland.gov.uk/Publications/2014/05/9242>.

<sup>81</sup> Scottish Government, *the Government Economic Strategy* (n 2) at 12.

<sup>82</sup> Scottish Parliament, RACCEC Report (n 65) at para 78.

<sup>83</sup> Scottish Parliament EETC Report (n 66) at conclusion 3, para 112 and see Scottish Government Consultation on Scottish Regulators’ Strategic Code of Practice (n 78) Annex A.

take economic factors appropriately into account, determine an appropriate balance where necessary and be accountable for their decisions.’<sup>84</sup>

Unfortunately, the draft code itself contains no similar provisions which means it could be used in other ways. That said, the draft guidance for SEPA explicitly states that s.20A ‘provides a clear hierarchy which acknowledges the three elements of sustainable development but that primacy is to be given by SEPA to protecting and improving the environment.’<sup>85</sup>

Ideally, the Government will draft specific guidance not just for SEPA but for each public body. It has already done so for planning. The new draft SPP on Sustainability and Planning states that ‘planning should enable development that creates sustainable places across Scotland.’ No definition is given of a ‘sustainable place’ but twelve principles are set out to guide decision making.<sup>86</sup> The policy sets out the issues that arise in the context of planning quite well but the above reads more as a wish list and contains no guidance as to priorities. This brings us back to the broader question as to the contribution of the duty. It seems to focus on economically sustainable growth and while protecting and enhancing the natural heritage are mentioned, they are low on the list and operating within the carrying capacity of the Earth is not mentioned let alone held out as a parameter for sustainable decision making.

Another source of inconsistency arises because, regardless of the Government’s intended meaning of the full phrase, the terms ‘sustainable’ and ‘economic growth’ already have accepted meanings in linguistic and policy terms which cannot be ignored. As a result, there are significant problems integral to the actual phrase ‘sustainable economic growth’ and as discussed below, these are even more pronounced than those associated with ‘sustainable development’. As discussed, above ‘economic growth’ is an increase in the amount of goods and services produced per head of the population over a period of time. It is measured by gross domestic product (GDP).<sup>87</sup> Growth in mean income alone does not guarantee that the full range of human needs and aspirations will be satisfied. Simon Kuznets, the key architect of GDP as a metric, warned against equating its growth with wellbeing.<sup>88</sup> Interestingly, government officials and proponents of the duty regularly refer to the Government’s objective, as ‘sustainable economic development’ rather than sustainable economic growth.<sup>89</sup> It is a slip of the tongue, but the two terms are far from equivalent. Sustainable economic

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<sup>84</sup> Scottish Government, Consultation on Scottish Regulators’ Code of Practice (n 78) paras 8 and 9.

<sup>85</sup> Scottish Government Consultation on SEPA guidance (n 80) para 2.4.

<sup>86</sup> Scottish Government, *Sustainability and Planning* (n 41) para 7.

<sup>87</sup> <http://www.oxforddictionaries.com/definition/english/economic-growth>

<sup>88</sup> S. Kuznets, "National Income, 1929–1932". (1934) 73rd US Congress 2d session Senate document no. 124, 7.

<sup>89</sup> Personal observation and see Scottish Parliament, Official Report, Economy, Energy and Tourism Committee (n 41) col. 2892–2934 at 2903, 2905 and 2933 where representatives from two organisations in favour of the new duty refer to the Government’s objective as sustainable economic development: Professor Russel Griggs of

development is much closer to sustainable development in that it seeks to promote a rise in the wellbeing of society as a whole as reflected in the expanded set of opportunities. Much of the literature on the new Sustainable Development Goals and transition to a green economy now advocates measuring success more broadly using multiple indicators to monitor not only economic improvement, but also equity and other social and environmental improvements.<sup>90</sup>

Adding the word ‘sustainable’ in front of economic growth does not guarantee social or environmental wellbeing. Both the British and US editions of the Oxford English dictionary define the word ‘sustainable’ as 1. ‘able to be maintained at a certain rate or level’ and 2. able to be upheld or defended.<sup>91</sup> Thus, a sustainable economy would be an economy that is stable, resilient and well regulated. The UK Chancellor of the Exchequer George Osborne was using this interpretation in 2013 when he stated in his autumn speech on the economy that: “We now know that truly sustainable growth also depends on sound public finances, well capitalized banks, healthy balance sheets, and a system of financial regulation that is alert to broader risks to the economy like asset bubbles and excessive debt.”<sup>92</sup> These are valuable features that are ‘necessary’ for sustainable development, however, they are not ‘sufficient’ as no mention is made of the resources upon which the economy depends.

‘Sustainable’, in the sense of ‘living within the earth’s limits’, is more accurately described as ‘ecological sustainability’ or ‘environmental sustainability’.<sup>93</sup> Similarly, a stable and well run health system is evidence of ‘social sustainability’.<sup>94</sup> If, as discussed above, in order to flourish Scotland needs an economy that operates within the ecological limits of the Earth for the benefit of its inhabitants now and in the future, then simply adding the word ‘sustainable’ in front of economic growth does not deliver. It does not take into account justice, wellbeing, equity or environmental limits nor does it acknowledge the possibility that Scotland may be able to flourish with an economy that is sustainable but not necessarily growing. In plain English, sustainable economic growth means just that – continuing economic growth indefinitely.

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the Regulatory Review Group and Riddell Graham of VisitScotland available at

<http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8436&mode=pdf>

<sup>90</sup> Human Development Index website available at <http://hdr.undp.org/en/statistics/hdi>. For a list of strong alternative measures to GDP see R. Costanza et. al (n 3), Table S1

<sup>91</sup> <http://www.oxforddictionaries.com/definition/english/sustainable>

<sup>92</sup> Chancellor of the Exchequer George Osborne, Keynote speech on the economy (9 September 2013) available at <https://www.gov.uk/government/speeches/chancellor-speech-on-the-economy>

<sup>93</sup> Note some authors believe the term ‘sustainability’ while valuable as an overarching principle for ecological ideals is also limited as it fails to account for the extreme complexity, uncertainty and lack of stationarity that characterises the world today. In contrast, ‘resilience’ does not require certainty and instead emphasises adaptive capacity and adaptive management rather than stationarity. see M.H Benson, R.K. Craig “The End of Sustainability” (2014) Society & Natural Resources DOI: 10.1080/08941920.2014.901467 .

<sup>94</sup> S Woodcraft, N Bacon, L Caistor-Arendar, T Hackett *Design for Social Sustainability* (2011) 54.

Finally, regardless of how this Government interprets sustainable economic growth, there is no guarantee that a future government or the courts will not interpret it to mean a stable economy with no mention of its impact on ecological and social sustainability. History has shown that where key decisions need to be made, the need to address immediate pressures (including war, economic recession, disaster, or an upcoming election) will very often outweigh concerns about long term effect.<sup>95</sup> Indeed, terms like sustainable economic growth that are capable of numerous and diverse interpretations can lead to governments under pressure opting for easier definitions which favour short term solutions.<sup>96</sup>

## (2) Inconsistencies created by provisions in the Act

The possible benefits of crystallising accepted policy objectives as legal duties are well documented elsewhere.<sup>97</sup> Legislation can compel compliance and adherence to best practice and promote consistency in the interpretation and use of certain principles, approaches, or tools. Importantly, it can also protect innovative and crucial procedures, institutions and goals from electoral short-termism and support leaders' efforts to act for the benefit of the long term. Well drafted duties can create legal rules which will provide a framework for consistent decision making.<sup>98</sup> However, crystallising obligations in legislation has its drawbacks. It decreases flexibility. The scientific nature of sustainable development is such that, to use the language of Victorian draftsman Lord Thring, 'it should be always speaking' and its interpretation should evolve and change over time to reflect best current scientific knowledge.<sup>99</sup> Legislation may formalise insufficiently ambitious goals or so ambitious that it is ignored. A new duty may also contradict or sit uncomfortably with the wider aims or other duties imposed. Finally, there is a danger that regulators and regulated become saturated with so many duties that the benefits of legislating are lost.<sup>100</sup> Some of these issues arise in relation to sections 4 and 51 and these are discussed below.

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<sup>95</sup> E.g. the Scottish Government's decision to scrap tolls on the two road bridges into Fife and its continued support of opencast coalmining in Scotland as a growth industry. Consultation on Opencast Coal Restoration and Effective Regulation available at <http://www.scotland.gov.uk/Publications/2013/12/7688/0>

<sup>96</sup> E.g. the narrowing of the meaning of 'public authority' in *Smartsource Drainage and Water Reports v. Information Commissioner* [2010] UKUT 415 (AAC); [2011] J.P.L. 455; R. Lazarus "The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains" (2012) 100 *The Georgetown LJ* 1507; S Curran, "Sustainable development v sustainable management: The interface between the Local Government Act and the Resource Management Act" (2004) *NZJEL* 8 267.

<sup>97</sup> S. Hendry "Statutory Duties: Worth the Paper They Are Written On?" 2005 *JPEL* 1145-1158; IR Roberts, CT Reid, 'Nature conservation duties: more appearance than substance' (2005) 17 (4) *ELM* 17 162-168; A Ross "Why legislate for sustainable development? An examination of sustainable development provisions in UK and Scottish statutes" (2008) *J.Env'l Law* 20(1), 35-68; C.T Reid, 'A new sort of duty? The significance of "outcome" duties in the climate change and child poverty acts' (2012) *Public Law* 749-767.

<sup>98</sup> A. Ross "It's time to get serious – why legislation is needed to make sustainable development a reality in the UK" (2010) *Sustainability*, 2(4), 1101 at 1125.

<sup>99</sup> See *R v. Burstow and Ireland* [1998] AC 147 at 159 quote by Lord Steyn

<sup>100</sup> Ross (n 22) Chapter 8; Reid (n 97).

In terms of legislative drafting, the actual wording of sections 4 and 51 of the Act is commendable as comparable duties to ‘have regard to’ are too weak to influence agency behaviour and decision-making.<sup>101</sup> These duties simply end up as one of numerous material considerations or concurrent (often conflicting) objectives. Instead, duties to ‘contribute to achieving’ can act as legal rules and provide a strong framework for decision making so long as they remain sufficiently unqualified. That said, both of the new duties are subject to significant qualifications that have the capacity to minimise or even neutralise their impact. These qualifications warrant further discussion.

The duty to ‘contribute to achieving sustainable economic growth’ is subject to two significant qualifications that could create inconsistency. Specifically, section 4 provides that (1) In exercising its regulatory functions, each regulator must contribute to achieving sustainable economic growth, *except to the extent that it would be inconsistent with the exercise of those functions to do so*. As such, the obligation is secondary to the primary functions of the particular public body and limits the extent to which bodies are actually caught by the provision despite being listed in the Schedule. This problem has been well documented in other areas.<sup>102</sup> A key source of uncertainty is how to determine where the threshold of inconsistency lies for any particular public body.

Moreover, subsection (4) provides that ‘*Subsection (1) does not apply to a regulator to the extent that the regulator is, by or under an enactment, already subject to a duty to the same effect as that mentioned in that subsection*’. The question here is what is an equivalent duty? Several public bodies already have very similar obligations. For example, under the Climate Change (Scotland) Act 2009 section 44 (1)(c) A public body must, in exercising its functions, act in a way that it considers is most sustainable. These provisions apply to all the regulators subject to section 4 of the Act. How is the new duty any different to ‘in a way it considers most sustainable’? Similarly, local authorities in exercising their development planning functions must do so with the objective of contributing to the achievement of sustainable development (Planning etc. (Scotland) Act 2006 s. 2). More generally, under section 1 of the Local Government in Scotland Act 2003 it is the duty of a local authority to make arrangements which secure best value. ‘Best value’ is defined as the continuous improvement in the performance of the authority's functions and requires the authority to maintain a balance between the quality of its performance of its functions; the cost to the authority of that performance; and the cost to persons of any service provided by it for them on a wholly or partly rechargeable basis.<sup>103</sup> In addition, the local authority shall discharge its duties under this section in a way which contributes to the achievement of sustainable development.<sup>104</sup> The question is whether a duty to ‘secure best value in a

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<sup>101</sup> Ross (n 97).

<sup>102</sup> Ross (n 22) Chapter 8; Roberts and Reid (n 97); Reid (n 97).

<sup>103</sup> S. 1(1).

<sup>104</sup> S. 1(4).

way which contributes to sustainable development’ has the same effect as ‘contributes to achieving sustainable economic growth’?

Likewise, the relationship between SEPA’s objective set out in section 20A (2) (b) achieving sustainable economic growth and its other obligations is unclear but easier to amend. Under the Environment Act 1995, the Scottish Ministers are obliged to give guidance to SEPA which must include guidance towards attaining the objective of achieving sustainable development and SEPA must have regard to such guidance.<sup>105</sup> This guidance is in the process of being amended to elaborate on the relationship between the two concepts and their corresponding provisions.<sup>106</sup>

However, another issue arises in the SEPA provision. SEPA is the regulatory champion for the environment in Scotland and new section 20A(1) makes this fact emphatically and puts it ahead of sustainable economic growth in SEPA’s priorities. The duty to improve the health and well being of people in Scotland, in section 20A (2) (a) is likewise a crucial objective for all government activities in Scotland. These are both about what people want rather than how they are to get there. As discussed below, sustainable economic growth is arguably an enabler or a way of making true outcomes occur. It is like good governance and using sound science wisely. Indeed, it could be argued that section 20A (2) (b) ought to refer to sound science rather than sustainable economic growth as it is science that SEPA has to address in its regulatory role on a much more regular basis.

Moreover, other duties exist that are not so closely aligned to ‘sustainable economic growth’. For example public bodies are to ‘further the conservation of biodiversity’ and to ‘act in the way best calculated to contribute to the delivery of the greenhouse gas emission targets’<sup>107</sup> It is inevitable that these will, on some interpretations, conflict with the duty imposed by section 4(1). There will often be plenty of room for argument over the "proper" interpretation of these duties so as to justify non-compliance with the more precise provisions in the regulations. Which is to take priority when there is a conflict? It is conceivable that section 4 will never be legally enforced. Indeed, given its vague meaning, the number of qualifications to it and related duties there is a strong likelihood that the creation of this legal duty will make no difference to the ways decisions are taken to any extent greater than could be achieved through policy, guidance and training.<sup>108</sup> In evidence, a number of public bodies stated that they believed the duty would have very little impact on their actions or decision making.<sup>109</sup>

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<sup>105</sup> Environment Act 1995 s. 31.

<sup>106</sup> Scottish Government Consultation on SEPA guidance (n 80).

<sup>107</sup> Nature Conservation (Scotland) Act 2004 s. 1; Climate Change (Scotland) Act 2009 s.44 (1).

<sup>108</sup> Reid (n 73).

<sup>109</sup> Scottish Parliament, Official Report, Economy, Energy and Tourism Committee (n 66) at col.2933.



Finally, as noted by Reid, authorities already have to cope with so many duties imposed on them, that the benefit gained by singling out one or two duties as deserving special legal status may now be lost by the number of duties imposed.<sup>110</sup> It may be that the Government's main aim for the provision is simply symbolic, declaring and emphasising the Government's commitment to sustainable economic growth.<sup>111</sup> Symbolism can be an effective driver of positive change, for example, the vague provisions in the Natural Heritage Scotland Act 1991 were highly symbolic as the first mention of environmental sustainability in a UK statute,<sup>112</sup> and the ambitious but possibly unenforceable targets set out in the Climate Change (Scotland) Act 2009 are encouraging research and funding of new technologies.<sup>113</sup> However as set out above, 'sustainable economic growth' is not an innovative term nor is it going to accelerate progress to sustainability. In many ways, the formalisation of a policy could be seen as the current government trying to crystallise its own particular rhetoric of sustainable development and impose its will on future governments.<sup>114</sup>

## F. POSSIBLE IMPLICATIONS OF THE DUTY

Assuming the Government's intention is that the duty should make a difference and that it does have the capacity to impose a genuine obligation on certain public bodies to contribute to sustainable economic growth, it is necessary to examine the possible implications of the duty on decision making in Scotland. In particular, the duty to contribute to sustainable economic growth appears to raise two issues in relation to public sector decision making.

### (1) Shift in the traditional role of the regulator towards paternalism

Regardless of the specifics, what is clear is that the Government's objective in legislating is to ensure public bodies consider the economic implications in exercising their functions including their regulatory functions.<sup>115</sup> The Federation of Small Businesses ('FSB') state that 'In our view, such a duty could best be met by regulators demonstrating, both at a strategic and operational level, that they have integrated

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<sup>110</sup> Reid (n 97).

<sup>111</sup> See quote from Lord Rooker in the House of Lords during the passage of the Climate Change Act 2008 at *Hansard, HL Vol.696, col.1209 (November 12, 2007)*.

<sup>112</sup> Ross (n 97).

<sup>113</sup> See commitments in Climate Ready Scotland: Scottish Climate Change Adaptation Programme (2013) available at <http://www.scotland.gov.uk/Resource/0042/00426516.pdf> and the Climate Challenge Fund which supports communities across Scotland to take action on climate change and move to low carbon living available at <http://www.scotland.gov.uk/Topics/Environment/climatechange/howyoucanhelp/communities/ClimateChallengeFund>.

<sup>114</sup> A. McHarg 'Climate change constitutionalism? Lessons from the United Kingdom' (2011) 2 *Climate Law* 469–484.

<sup>115</sup> Scottish Government, *Consultation on Scottish Regulators' Strategic Code of Practice* (n 78) Annex A.

the principles of better regulation into their regulatory functions.<sup>116</sup> However, the duty on public bodies to exercise their functions so as to contribute to sustainable economic growth goes well beyond any better regulation obligations and actually requires public bodies to assess the economic value of projects and the investments. Assessing the economic feasibility of a project is well beyond the traditional roles of government in Scotland and the UK. The Law Society for Scotland in its evidence notes that the duty is likely to lead to a perception in application processes that decision makers should have detailed regard to the economic aspects and prospects of the proposals during the planning or environmental permitting process.<sup>117</sup> Neither the planning system nor the environmental permitting systems are currently equipped to extend their considerations to the economic benefits or prospects of success of development proposals, in any but the most general sense, such as the prospects for employment, and the adequacy of the supply of land in the right location.<sup>118</sup> It has long been the established view that assessing the benefits, or indeed prospects of success, of an investment is not a proper concern for the planning system unless it has land use implications such as the prospect of being left with a derelict site.<sup>119</sup> The environmental permitting system has slightly wider financial assessment duties under regulation 4 of the Pollution Prevention and Control (Scotland) Regulations 2012 to enable the regulator to evaluate the cost and accessibility of environmental protection measures and whether they are ‘the best available techniques’ but these are still not sufficiently wide to include the business prospects of any application.

## (2) Prioritising economic growth over ecological sustainability and curbing consumption

Assuming again that the duty is capable of influencing decision making by public bodies then as discussed above, it is difficult to establish the priority to given to operating within environmental limits since the interpretation of sustainable economic growth varies significantly.

Even taking the most ecologically sound interpretation of sustainable economic growth offered by the Government, such as that set out in either the Marine Plan or the new draft code of practice, a duty to contribute to the achievement of sustainable economic growth is still most likely to be interpreted as meaning that decision makers are under an obligation to ensure their decisions contribute to the growth of the Scottish economy. The likelihood of regulators favouring short term solutions to immediate pressures such as unemployment or an upcoming referendum is much higher with sustainable economic growth than for sustainable development since ‘growth’ is focused predominantly

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<sup>116</sup> Scottish Parliament, EETC Report (n 66) Annex D, evidence of Federation of Small Businesses at 3.

<sup>117</sup> Scottish Parliament, EETC Report (n 66) Annex D evidence of Law Society of Scotland.

<sup>118</sup> Scottish Parliament, EETC Report (n 66) Annex D evidence of Law Society of Scotland.

<sup>119</sup> *J Murphy & Sons Ltd v Secretary of State for the Environment* [1973] 1 WLR 560; *Walters v Secretary of State for Wales* (1979) 77 LGR 529; *Sosmo Trust Ltd v Secretary of State for the Environment* [1983] JPL 806.

on increasing GDP unlike ‘development’, which also takes account of individual and societal wellbeing, justice or distributional factors.

The duty to contribute to achieving sustainable development sets different priorities from a duty to contribute to achieving sustainable economic growth. Even though it is likely the case that decision makers using either duty will account of the whole range of relevant considerations and that for individual decisions, any difference may be at the margins, the cumulative effect is that if every marginal decision prioritises economic over other considerations, then this may mean that the balancing process will be skewed away from protecting the environment. For example, arguably, the duty to contribute to sustainable economic growth could justify:

- An energy policy which re-opens Scotland’s coal mines by prioritising access to a cheap, secure, and predictable energy source over environmental degradation and concerns over climate change.
- The grant of licenses to kill birds of prey to high paying visitors thus prioritising the rural economy over wildlife and conservation.

This could mean that despite any perceived increase in economic prosperity Scotland would be poorer in other respects. As noted in the Law Society evidence, there are a significant number of examples throughout Scotland’s economic history where economically based decisions have later come to be regretted, in particular, unregulated heavy industry and mineral extraction or exploitation in Scotland which was permitted to operate in ways that left a legacy of contaminated land and river pollution for future generations to address. Portavadie village, on the eastern side of Loch Fyne, was never used for its purpose as a site for the construction of concrete North Sea oil rig platforms. It has lay derelict for 20 years and is an example of poor decision making where undue emphasis was placed on the hope of economic development that never occurred. The current approach where the investor deals with the finances is well established as fit for purpose, is intended to avoid such bad decisions, and ensure appropriate management.<sup>120</sup> Such sustainability disasters would hopefully be identified early and avoided now due to enhanced scrutiny.

Related to this argument is the fact that the duty also runs counter to existing obligations on the Scottish Government that recognise the immense value of high environmental standards in their own right. For example it is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions and in doing so must have regard to the Scottish Biodiversity strategy and its international obligations

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<sup>120</sup> Scottish Parliament, EETC Report (n 66) Annex D evidence of Law Society of Scotland.

under the Convention for Biological Diversity.<sup>121</sup> While this provision is arguably as vague as the duty to contribute to achieving sustainable economic growth, a further obligation was imposed in 2011 to require public bodies to produce reports on their compliance with biodiversity duty in 2014 or 2015.<sup>122</sup> This reporting obligation is legally enforceable as the report is either produced or it is not.

When taking individual decisions regulators consider a wide range of factors - economic, social and environmental and balance these accordingly. Duties relating to sustainable development reflect this balance. Despite all the qualifications and government assurances to the contrary, this new duty is focused on economic growth, and as a result, will inevitably tilt the scales permanently in favour of the economic arguments to the detriment of all others, notwithstanding their importance.<sup>123</sup>

## F. ANALYSIS AND CONCLUSIONS

There are four key observations that can be made from the discussion above.

First, together the Economic Strategy and the NPF provide a holistic and integrated approach to governance which sets out a clear vision with set objectives that are transparent and allow progress to be measured and reviewed using clear targets and timetables. This SMART approach could be used to effectively integrate sustainable development including better regulation and transition to a low carbon economy into all aspects of governance in Scotland. However, so far the national indicators particularly those relating to the environment, show that the approach is not delivering progress.

Second, this stagnation can largely be attributed to inconsistencies within the Government's articulated purpose, its abbreviated form and interpretation. The Scottish Government's central purpose is to 'create a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth'. This has been shortened to a sound bite of 'increasing sustainable economic growth'. The question is whether increasing 'sustainable economic growth' really is the most important objective for the Scottish people? Indeed, Scots want to be successful, they want to flourish, how that happens is most likely to be of secondary concern to them. It is possible that the Scottish Government could achieve sustainable economic growth without Scotland being successful or flourishing. Conversely, it is conceivable that Scotland could be very successful and most Scots flourishing without growth. As such, the shortened purpose of increasing sustainable economic growth is too narrow and restrictive an economic goal and detracts from the real objective of 'a successful

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<sup>121</sup> Scottish Government, 2020 Challenge for Scotland's Biodiversity - A Strategy for the conservation and enhancement of biodiversity in Scotland June 2013 available at <http://www.scotland.gov.uk/Resource/0042/00425276.pdf>; Nature Conservation (Scotland) Act 2004, s. 1

<sup>122</sup> Wildlife and Natural Environment (Scotland) Act 2011 s.36.

<sup>123</sup> Scottish Parliament, EETC Report (n 66) Annex D evidence of the Law Society of Scotland.

Scotland with opportunities for all to flourish'. The message to the public sector is skewed by the inclusion of growth and marginalizes success or failure of government to meet the real purpose of a successful Scotland.

Third, unless properly defined, there is a very clear danger that sustainable economic growth will encourage over consumption and by focussing on growth rather than development it ignores two key features of the Scottish culture – justice and fairness. Over consumption and using more than our fair share of resources are key challenges facing the developed world. Regardless of the differing views on the need for economic growth, there is an emerging consensus that success needs to be decoupled<sup>124</sup> from increased resource use and this requires cultural change away from materialism that judges success in more holistic ways than GDP. The Scottish Government while keen to be world leading in addressing climate change and transforming its economy to low carbon has failed to realise that by promoting consumption by explicitly prioritising growth (even sustainable growth), it is actually contributing to the problem. At present, the actions and priorities in the Scottish Strategy promote consumption - buy more, make more, more efficiently. It continues to link success and happiness with growth and consumption. There is little incentive to use less and make less or enjoy what we have.

Finally, as noted above the duty of 'sustainable economic growth' is not necessary for the better regulation agenda and the Act contains more effective provisions to directly promote better regulations including the power to issue regulations and the code of practice. The draft code of practice contains detailed guidance on adopting a positive and enabling approach, improving communications with stakeholders and tailoring approaches.<sup>125</sup>

Despite the fact that the Act has been passed and the new duties exist, there remain several opportunities for the Scottish Government to meet the aspirations for Scotland it has set out in its Strategy. These are explained below.

First, the relationship between sustainable economic growth and sustainable development and their corresponding duties needs to be clarified. A successful economy is vital for the production and distribution of the goods and services including environmental and social ones that we need to survive. However, as noted above, several witnesses before the various Committee, did not consider that an additional duty to promote 'sustainable economic growth' would add anything positive to the existing

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<sup>124</sup> UNEP Decoupling natural resource use and environmental impacts from economic growth, A Report of the Working Group on Decoupling to the International Resource Panel (UNEP, 2011) available at [http://www.unep.org/resourcepanel/decoupling/files/pdf/Decoupling\\_Report\\_English.pdf](http://www.unep.org/resourcepanel/decoupling/files/pdf/Decoupling_Report_English.pdf).

<sup>125</sup> Scottish Government, Consultation on Scottish Regulators' Strategic Code of Practice (n 49) Annex A

principle, and there were concerns that the proposed new duty would introduce some confusion about what should and should not be considered in any decision making process.

But, properly drafted duties on public bodies can accelerate progress towards sustainable development.<sup>126</sup> Duties can serve to promote cultural change within government and beyond and unlike, procedures on their own, duties can be very symbolic. Ideally, if supported by procedural requirements to report, review and monitor duties can be enforceable and make an impact.<sup>127</sup> Clearly worded duties can also create a meaningful framework for decision making based on sustainable development.<sup>128</sup>

Sustainable development has proven its resilience as a widely accepted, and now expected and measured, policy objective: internationally, in the EU, in Scotland and elsewhere in the UK.<sup>129</sup> While its specific meaning remains unclear, policy makers, regulators, the private and voluntary sectors in Scotland and elsewhere understand the concept and parameters of ‘sustainable development’. Most versions of sustainable development make decision makers at least consider the long term effects of their actions on the ecological limits of the Earth and its inhabitants, now and in the future. The phrase is already embedded in Scots law and policy in many areas including water supply and services, national parks, climate change, and planning. ‘Contributing to the achievement sustainable development’ the most common phrasing of the existing legal duties, already reflects the need to support development, but also the obligation, shared internationally, to evaluate development proposals against any adverse environmental or social impact, and not to support development that is environmentally unsustainable. To do otherwise would undermine the duty of stewardship of the world’s resources.

If the existing duties to contribute to achieving sustainable development were extended to ALL public bodies this would better represent the aspirations set out in the Strategy and NPF and would be more in line with the Scottish Government’s central purpose of ‘a successful Scotland with opportunities for all to flourish’ than the duty to contribute to achieving sustainable economic growth. Indeed, sustainable development could be defined in Scotland using the Government’s existing central purpose of ‘a successful Scotland with opportunities for all to flourish’. This approach puts the health and wellbeing of Scotland’s people and environment, now and in the future, at the forefront of the definition and the inclusion of a clear, forward looking definition of sustainable development into such a clear approach to governance would be world leading.

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<sup>126</sup> J. Dembach (principal author) *Acting as if Tomorrow Matters: Accelerating the Transition to Sustainability* (2012) chapter 15.

<sup>127</sup> Ross (n 22) chapter 13 and Land Reform (Scotland) Act 2003 s.34(4); Local Government in Scotland Act 2003 s.13(1).

<sup>128</sup> Ross (n 22) chapter 13 and Water Environment and Water Services (Scotland) Act 2003, s.2(4); Planning etc. (Scotland) Act 2006 s.2.

<sup>129</sup> S Bell, D McGillivray, O Pedersen *Environmental Law* 8<sup>th</sup> Edition (2013) 788 at 60.

That said, the likelihood of Parliament repealing the duty on sustainable economic growth in the near future is low. However, it could be possible to retain the duty and link it to the sustainable development duty set out above. A 'sustainable economy' or arguably 'sustainable economic growth' is a key part of sustainable development and a key tool to help Scotland flourish. Used in this way, sustainable economic growth would return to being an enabler rather than an objective. If this occurred then both duties could ably sit next to one another if there was also a consistent interpretation of sustainable economic growth that was in line with sustainable development and with environmental and equity priorities. The explanation set out in the consultation paper accompanying the regulator's draft code already comes very close to doing just this. Very importantly, this shift also needs to be taken through in the Government's Strategy and NPF and the implementation gap which exists in the Strategy and NPF between the outcomes / aspirations and the actions/ priorities in relation to living within environmental limits needs to be closed. The sustainability purpose target for example needs to consider more than just a decrease in greenhouse gas emissions to reflect more aspects of environmental sustainability including reducing consumption. A particularly ambitious target would be to decrease in Scotland's eco-footprint or, alternatively, complement the greenhouse gas emission target with a biodiversity target. The low carbon economy strategic priority could be broadened to sustainable or green economy but ideally using definitions that do not prioritise growth.

To be truly world leading, Scotland could apply recent research on transition to a green economy (resilience, prosperity etc.) and make a serious attempt to decouple flourishing (or wellbeing) from increasing resource use. To do this, it would be preferable to focus on achieving a sustainable economy rather than increasing sustainable economic growth. This shift would acknowledge the complexities and uncertainties in the world today and allow flexibility. It would focus on our capacity to mitigate and adapt to climate change and allow growth, plateauing or even a shrinking of the economy so long as it is was leading to a successful Scotland with opportunities for all to flourish. This would also address consumption. Such a definition could make Scotland a leader in accelerating progress towards true sustainable living.

The suggestions above involve enormous cultural, political and economic transitions at a time when Scotland was already considering significant upheaval by way of independence from the UK. A key part of accelerating progress towards sustainable development is good governance, with strong participatory, open and transparent decision making. The whole process of developing the sustainable economic growth duty in Scotland highlights how difficult it is to prioritise the different factors within sustainable development to make it not only meaningful but also deliverable. Scotland is not alone in this struggle as evidenced by the debates on the Sustainable Development Goals, the international climate change negotiations and closer to home, the slow process of producing and passing a Wellbeing

of Future Generations Bill in Wales. However, Scotland is in a very strong position as the process also highlights an increasing maturity and confidence in Scotland's institutions and wider policy community.

The policy community in Scotland could have chosen to pre-occupy itself entirely with the 2014 referendum on independence and ignore sustainability governance altogether or it could have unhelpfully politicised it by linking it too closely to the independence debate. Instead the two debates have occurred concurrently but separately. One of the key reasons the debates were separate is simply because Scotland already holds many of the powers related to sustainability and the sustainability discussions need to occur whether or not Scotland chooses to be independent from the rest of the UK. However, it is valuable to note that the two opposing political protagonists in the debates over sustainable economic growth – the SNP Government and the Scottish Green Party – were both in favour of an independent Scotland. In many ways, the concurrent debate on sustainability highlighted the many different visions of Scotland's potential future on both sides of the independence campaign.

The introduction of the Regulatory Reform (Scotland) Act 2014 can also be seen as a catalyst for the debate on sustainability in Scotland. The Bill attracted the attention of the broader policy community who have provided reasoned arguments both for and against the inclusion of the duty. The consultations, the parliamentary inquiries and debates have played and are playing a significant role in informing the future of Scottish Government policy on sustainable development by encouraging an open, inclusive, continuous and responsive discussion on its meaning and potential role in the governance of Scotland. Indeed, it has only been since the introduction of the proposed duty that the Government has shown a willingness to explain and then refine its views on the meaning and role of 'sustainable economic growth' for the Government in both policy and legal contexts.<sup>130</sup> Over 2013-2014, the term 'sustainable economic growth' and its relationship with other duties like sustainable development has been defined, discussed, refined, and changed several times over. The journey is ongoing. This evolutionary process over the past year while confusing and frustrating is also indicative of the broad, open and evidence based nature of Scottish policy making. The Government, the Parliament together with the wider policy community are actively and openly discussing how to get Scotland to where it wants to be. This debate looks set to continue as Scotland seeks additional powers under a new devolution settlement.

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<sup>130</sup> Some discussion about the term did arise in 2009- 2010 but only in the context of planning with the development of the Scottish Planning Policy 2010 (see above discussion for detail).